C. A. BRADLEY,

THE PUBLIC UTILITIES

ON APPEAL FROM THE

BRIEF ON BEHALF OF

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Supreme Court of the United States

OCTOBER TERM, 1932

No. 395

C. A. BRADLEY, DOING BUSINESS AS WOLVERINE MOTOR FREIGHT LINES, *Appellant*

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF ON BEHALF OF APPELLANT.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Ohio is reported in 125 O.S. 381, 181 N.E. 668 and appears upon pages 30 and 31 of the Record. It is a *per curiam* opinion and disposes of this case upon the authority of the decision and opinion of the same court in the case of *Motor Transport & Truck Co.* v. *Public Utilities Commission of Ohio,* 125 O.S. 374, 181 N.E. 665, which appears in full in the Record at pages 31 to 38.

JURISDICTION.

This is an appeal from the decision of the Supreme Court of Ohio affirming an order of the Public Utilities Commission of Ohio, denying the appellant's application for a certificate of public convenience and neces-

sity to operate as a common carrier of property by motor truck in interstate commerce over certain highways within the State of Ohio.

The grounds for the jurisdiction of this Court are stated in the appellant's Statement as to Jurisdiction made and filed in pursuance to the requirements of Rule 12 of the Revised Rules of this Court.

STATEMENT OF CASE.

The appellant, pursuant to the requirements of Ohio General Code, Section 614-87, applied to the Public Utilities Commission of Ohio, the appellee in this case, for a certificate of public convenience and necessity to operate as a common carrier of property by motor truck solely in interstate commerce. (R. 2-6, 8.) The route which his proposed operation was to traverse was as follows: U. S. Route 20 from Cleveland to the intersection of that Route and State Route 102; State Route 102 to Toledo; and from Toledo to the Ohio-Michigan state line over U. S. Route 25. (R. 5.) The final destination of the proposed operation was Flint, Michigan. (R. 3.)

A hearing was had before the commission, at which the protestants, the Pennsylvania Railroad Company and the New York Central Railroad Company, presented in evidence a traffic check or count, taken by an employee of the former company on U. S. Route 20 at Fremont, Ohio, on July 8, 9 and 10, 1931, which was confined to truck movement, and did not include buses or pleasure vehicles. (R. 13-16.) The appellant introduced a similar count, also taken in the city of Fremont, at a spot near the site of the protestants' count, on February 3, 4 and 5, 1932, including in its

scope all types of vehicular traffic. (R. 16-20.) The latter count showed, in the opinion of the person supervising it, an uncongested condition. (R. 18.) There was no evidence whatever as to the amount of traffic over U. S. Route 20 except at this one place within the corporate limits of this one city.

Upon this evidence, the commission entered an order denying the application of the appellant. (R. 21.) The reason for this refusal set forth in the order is as follows (R. 21):

> "The Commission, being fully advised in the premises, finds that said State (*sic*) Route No. 20, at this time, is so badly congested by established motor vehicle operations, that the addition of the applicant's proposed service would create and maintain an excessive and undue hazard to the safety and security of the traveling public, and the property upon such highway."

The appellant then applied to the commission for a rehearing, setting forth in this application as a reason therefor that the order of the appellee contravened both the Commerce Clause and the Fourteenth Amendment of the Constitution of the United States. (R. 22-23.) This application was also denied by the Commission. (R. 23-24.) The appellant duly brought a petition in error in the Supreme Court of Ohio, which affirmed the order of the commission. (R. 23-28.) The appellant then appealed to this Court. (R. 38-42.)

SPECIFICATION OF ERRORS.

The appellant specifies as errors:

First, the decision of the court below that the order of the commission denying the appellant's application for a certificate to operate in interstate commerce was

not an unlawful interference with interstate commerce in violation of Article 1, section 8, paragraph 3 of the Constitution of the United States, and

Second, the decision of the court below that the said order was not in contravention of the appellant's rights under the Fourteenth Amendment of that Constitution and more particularly the Equal Protection Clause therein contained.

THE STATUTE INVOLVED.

The appellant contended below that the commission had no authority or power under the laws and statutes of the State of Ohio to deny a certificate of public convenience and necessity upon the ground of congestion of the highways. The court, however, held that such authority existed under the provisions of Ohio General Code, Sections 614-86 to 614-102. (*Motor Transport & Truck Co.* v. *Public Utilities Comm.*, 125 O.S. 374, 181 N.E. 665, 666, R. 31.) This construction is conclusive, and the appellant does not here renew that contention.

The relevant portions of the statutes involved are set forth in full in Appendix "A" to this brief.

Ohio General Code, Section 614-84 defines "motor transportation company" to include all persons engaged in the business of common carriage of persons or property by motor vehicle. Section 614-86 vests the Public Utilities Commission of Ohio with power to regulate the rates and practices of motor transportation companies and generally to supervise and regulate such companies in all matters affecting the relationship between such companies and the public.

Section 614-87 prohibits operation as a motor transportation company without a certificate of public convenience and necessity which the commission is author-

ized to grant only "when the existing motor transportation company or companies serving such territory do not provide the service required or the particular kind of equipment necessary to furnish such service to the satisfaction of the commission. . . ." The commission is also authorized to "attach to the exercise of the rights granted by such certificates, such terms and conditions as, in its judgment, the public convenience and necessity may require."

Section 614-100 provides a criminal penalty for operation in violation of any provision of sections 614-84 to 614-102, which sections are to apply to interstate commerce only "in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of congress." Section 614-102.

SUMMARY OF ARGUMENT.

The appellant presents two contentions:

First, that the order of the commission denying his application for a certificate to operate in interstate commerce is a direct and unreasonable burden upon such commerce and therefore an encroachment upon the power over such commerce exclusively vested in Congress by the Commerce Clause as interpreted by the decisions of this Court. Particular reliance is placed upon *Buck* v. *Kuykendall,* 267 U.S. 307, and *Bush & Sons Co.* v. *Maloy,* 267 U.S. 317.

Second, that the order of the commission violates the Equal Protections Clause of the Fourteenth Amendment because by virtue of the authority vested in it by the Ohio statute, the commission has power to exclude only common carriers, while contract carriers and "shipper-owners" may operate over U.S. Route 20 regardless of the traffic conditions existing thereon.

ARGUMENT

I. THE ORDER OF THE COMMISSION DENYING THE APPELLANT'S APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY CONSTITUTES AN UNLAWFUL INTERFERENCE WITH INTERSTATE COMMERCE IN VIOLATION OF ARTICLE I, SECTION 8, PARAGRAPH 3 OF THE CONSTITUTION OF THE UNITED STATES.

A. THE ORDER OF THE COMMISSION IS INVALID BECAUSE IT IMPOSES A DIRECT BURDEN UPON INTERSTATE COMMERCE.

1. The order of the commission excludes the appellant from engaging in his proposed interstate operation.

The operation as a common carrier of property proposed by the appellant in his application constitutes him a "motor transportation company" within the terms of Ohio General Code, Section 614-84.

Ohio General Code, Section 614-87 provides that no motor transportation company shall commence operations within the state of Ohio without first obtaining from the appellee a certificate of public convenience and necessity. A criminal penalty is attached to operation in violation of this section by Ohio General Code, Section 614-100.

The court below has held that the order of the appellee denying appellant's application is properly within the authority of the appellee and is "permitted under the provisions of the constitution of the United States and the acts of congress" within the meaning of Ohio General Code, section 614-101. It therefore follows that the State of Ohio through its Public Utilities Commission has asserted the power to prevent and ex-

clude the appellant from operating, solely in interstate commerce, within the State of Ohio over the route proposed by the appellant.

2. This exclusion of the appellant from interstate operation is a direct burden on interstate commerce.

This exclusion, the appellant contends, is beyond the power of the state because it is both a direct and an unreasonable burden upon interstate commerce. The desirability of a state regulation or statute, intended to rectify a specific evil, does not determine the power of the state to enact such legislation. *Wabash, etc. Ry. Co.* v. *Illinois,* 118 U. S. 557, 577. It may be assumed that the power to enact and enforce a regulation of commerce such as that imposed by the order of the appellee exists; the sole question before this court is whether that power resides concurrently with Congress and the legislatures of the various states, or exclusively with Congress. *Cooley* v. *Board of Wardens of the Port of Philadelphia,* 12 How. 229, 319.

This issue is to be determined by a consideration of the directness and reasonableness of the burden imposed by the order of the commission upon interstate commerce. "If a state enactment imposes a *direct burden* upon interstate commerce, it must fail regardless of federal legislation". *The Minnesota Rate Cases,* 230 U. S. 352, 396. Each attempted exercise of the state legislative power must be scrutinized separately, and the directness of the burden thereby imposed upon interstate commerce determined by its actual effect upon the free flow of such commerce. Even if the burden is indirect only, the statute is not necessarily valid. As was said by Mr. Justice Brandeis in *Buck* v. *Kuykendall,* 267 U. S. 307, 315: "It may be assumed . . . that

appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, *where the indirect burden imposed upon interstate commerce is not unreasonable.*"[1]

The question, therefore, presented by this case is whether the absolute exclusion of the appellant from engaging in the operation proposed by him in his application, within the state of Ohio, is a reasonable regulation having only an indirect effect upon interstate commerce, or whether, as the appellant contends, such an exclusion is unreasonable and the burden imposed upon interstate commerce is direct.

In a number of decisions, this court has held that various state statutes affecting interstate motor transportation imposed direct and invalid burdens upon interstate commerce.

In *Sprout* v. *South Bend,* 277 U. S. 163, and *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, taxes upon the business of transportation by motor vehicle for hire in interstate commerce were declared invalid. And as was said by Mr. Justice Matthews in *Bowman* v. *Chicago, etc. Ry. Co.,* 125 U. S. 465, 483:

> "If the State has not power to tax freight and passengers passing through it, or to or from it, from or into another State, much less would it have the power directly to regulate such transportation, or to forbid it altogether."

In *Michigan Public Utilities Comm.* v. *Duke,* 266 U. S. 570, this Court held that an interstate contract carrier may not be compelled by state statute to assume the burdens of a common carrier. Similarly, a requirement that an interstate common carrier provide cargo

[1] Italics ours unless otherwise indicated.

or passenger insurance is beyond the power of a state to impose.

Michigan Public Utilities Comm. v. *Duke,* 266 U. S. 570, 577

Sprout v. *South Bend,* 277 U. S. 163, 171

Red Ball Transit Co. v. *Marshall,* 8 F. (2d) 635

Louis v. *Boynton,* 53 F. (2d) 471

Sage v. *Baldwin,* 55 F. (2d) 968

All of these burdens could be borne and the interstate motor carriers upon whom they fall might continue to operate. None of them go to the point of exclusion or prohibition of interstate transportation, yet each has been held a direct burden upon interstate commerce. The case at bar is a prohibition of interstate commerce. The burden is plainly direct.

That such is the case and that statutes imposing such a burden are invalid has been specifically decided by this Court.

a. This Court has consistently held that the exclusion of interstate commerce other than motor transportation is an unlawful interference with such commerce.

From the earliest times, this Court has held that state regulations which result in the absolute prohibition of the business of one engaged exclusively in interstate commerce constitute a direct burden upon such commerce and therefore demand the uniformity of federal regulation.

Gibbons v. *Ogden,* 9 Wheat. 1

License Cases, 5 How. 504

Bowman v. *Chicago, etc. Ry. Co.,* 125 U. S. 465

Leisy v. *Hardin,* 135 U. S. 100

Crutcher v. *Kentucky,* 141 U. S. 47

Austin v. *Tennessee,* 179 U. S. 343

International Text-Book Company v. *Pigg,* 217 U. S. 91

West v. *Kansas Natural Gas Co.,* 221 U. S. 229

Barrett v. *New York,* 232 U. S. 14

Sioux Remedy Co. v. *Cope,* 235 U. S. 197

Mayor of Vidalia v. *McNeely,* 274 U. S. 676

As was said in *Railroad* v. *Husen,* 95 U. S. 465, 469, 470:—

> "Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over the one is given by the Court of the United States, to Congress, in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a branch of interstate commerce is undeniable. . . ."

b. This Court has specifically held in Buck v. Kuykendall, and Bush & Sons Co. v. Maloy, that the exclusion of interstate motor transportation is a direct burden upon interstate commerce, and these decisions control this case.

Only two cases have previously been presented to this Court involving state regulations absolutely excluding interstate motor transportation. We refer to *Buck* v. *Kuykendall,* 267 U. S. 307, and *Bush & Sons Co.* v. *Maloy,* 267 U. S. 317. In both cases the exclusionary

regulations were held to constitute direct and unlawful burdens on interstate commerce. The case presented by this record is, the appellant submits, controlled by these decisions of this Court.

In the first case, Buck, the appellant, applied to the Department of Public Works of the State of Washington for a certificate of public convenience and necessity for an auto stage line between Seattle, Washington, and Portland, Oregon. Such a certificate was required by Washington Laws, 1921, chapter 111, section 4, the provisions of which were substantially similar to those of Ohio General Code, Section 614-87, here involved. The certificate was refused on the ground that the existing transportation facilities were adequate to serve the public needs. Thereupon, Buck brought suit in the United States District Court to enjoin the enforcement against him of the requirement of certification. From a final decree dismissing his bill, he appealed to this Court, which reversed the decree of the lower court on the ground that the statute as applied was an interference with the exclusive power of Congress so to regulate interstate commerce and therefore contravened the Commerce Clause.

The case presented in *Bush & Sons Co.* v. *Maloy*, 267 U. S. 317 was similar in all essential features. The plaintiff applied to the Public Service Commission of Maryland for a permit to operate as a common carrier of property over specified routes in interstate commerce. Such permits were required by Maryland Laws, 1922, chapter 401, section 4 which provided that the commission should refuse an application for a permit if it "deems the granting of such permit prejudicial to the welfare and convenience of the public." The plaintiff was refused a permit. It was alleged in the plain-

tiff's bill, seeking to enjoin the enforcement of the statute, that the commission in refusing the permit considered merely "whether or not existing lines of transportation would be benefited or prejudiced, and in this way the public interest affected." (267 U. S. 317, 324) This was admitted by defendant's demurrer. The trial court sustained the demurrer and dismissed the bill. The Court of Appeals of Maryland affirmed this decision and the case was brought to this Court on writ of error. This Court reversed the decision on the authority of the *Buck* case.

The principle of these decisions has apparently been heretofore recognized by the Ohio commission and the Supreme Court of Ohio. *Cannon Ball Transp. Co.* v. *Public Utilities Comm.*, 113 O. S. 565, 149 N. E. 713.

i. The purpose of the regulations and the power sought to be exercised in the Buck and Bush cases are the same as those in the present case.

Prior to the decision by this Court of the *Buck* case, the Supreme Court of Washington, in a precisely similar case, had upheld the Washington statute as applied to require a certificate of an interstate carrier. *Northern Pacific Ry. Co.* v. *Schoenfeldt,* 123 Wash. 579, 213 Pac. 26 (See also *State ex rel. Schmidt* v. *Department of Public Works,* 123 Wash. 705, 213 Pac. 31). This ruling was brought to the attention of this Court both by the opinion of the Court below, (*Buck* v. *Kuykendall,* 295 Fed. 197, 200) and by appellee in his brief. (Brief of Appellee, p. 43-44). In sustaining the statute as applied to interstate commerce, the highest court of the State of Washington interpreted it *as an exercise of the police power* of the state *to conserve the highways and maintain safety upon them.* It said (123 Wash. at 585; 213 Pac. at 28):

> "The purpose of the Act under consideration is clearly apparent from its title and contents, and that purpose is to regulate the use of the highways of the state by those engaged in carrying on business thereon for their own private gain, whether engaged in interstate or intrastate commerce, and it applies alike to each class without discrimination."

Again the court said (123 Wash. at 588-89; 213 Pac. 29):

> "The act of 1921, to paraphrase the language of Mr. Justice Hughes, above quoted, is a protective measure of a reasonable character in the interest of safety and welfare of the people of this state—safety because by the terms of the act the highways may not be used for private gain unless in the judgment of the department of public works, after a full hearing, such use will tend to the convenience or serve the necessities of the public, and unnecessary congestion with its attendant dangers be thereby prevented. Welfare, because the highways are built and maintained at great expense and all traffic thereon is to some extent destructive, therefore the prevention of unnecessary duplication of auto transportation service will lengthen the life of the highways or reduce the cost of maintenance."

The United States District Court accepted the construction of the state court that the statute was an exercise of the police power of the state to regulate the use of the highways for the public safety. It therefore found it to be only a reasonable and indirect burden on interstate commerce. *Buck* v. *Kuykendall,* 295 Fed. 197, 202.

Similarly, in *Bush & Son Co.* v. *Maloy,* 267 U. S. 317, the Court of Appeals of Maryland, in sustaining the statute as applied to refuse a permit to the plaintiff, placed that act squarely within the power to regulate

the use of the highways arising from the police power to preserve the highways and the safety of the public in their enjoyment of them. The Maryland court in that case said (*Bush & Sons Co.* v. *Public Service Comm.* 143 Md. 570, 577, 123 Atl. 61, 63):

> "The object and purpose of the act is to restrict to the needs of the public the number of motor vehicles used in the transportation of freight or merchandise upon any one route, and thereby avoid the additional injury and damage to the roads or highways, and the danger to persons traveling thereon, that would result from the use of a greater number than the needs and convenience of the public require. It must be that the safety of the traveling public is lessened by the increased number of motor trucks operating upon the roads."

Thus, in both the *Buck* and *Bush* cases, the state courts had specifically held that the object of the respective statutes was the regulation of the use of the highways and that the source of the power exercised was that of the legislature to preserve the highways and to make safe their public use. But this court reversed their conclusion that the respective statutes were constitutionally applied to *interstate commerce.*

Illumination is thrown upon this result by the recent case of *Stephenson* v. *Binford,* decided by this court on December 5, 1932, 77 L. ed. (adv. op.) 203. This court there held that a certificate or permit requirement based upon considerations of the effect of the proposed service of the applicant upon existing and competing transportation facilities may be sustained, as applied to intrastate carriers for hire, as an exercise of the police power of the state to conserve the highways.

It follows from that decision that the respective state courts in the *Buck* and *Bush* cases, while they were wrong in sustaining the certificate or permit requirements of their statutes, were right in holding that such requirements were within the scope of the police power to regulate the use of and traffic upon the highways to protect the public safety and preserve the roads. The *Stephenson* case demonstrates therefore that if the *Buck* and *Bush* records had presented cases of applications for *intrastate* certificates, the decrees of the lower courts would have been sustained as legitimate exercises of the state legislative power to conserve the highways and promote public safety thereupon.

Since, however, the decrees were reversed, the conclusions to be drawn are significant. The refusal of a certificate or permit where existing facilities are adequate is justifiable, in the case of an application by one proposing *intrastate* operation, as an exercise of the power to regulate the use of the roads to the end that the public safety may be preserved and the highways conserved. A statute prescribing such a refusal is supportable *because the refusal results in excluding the applicant from operation over the proposed route,* and thereby may perhaps prevent increased traffic over that route with the concomitant increase in congestion upon and destruction of the highways over which the route is laid. *Stephenson* v. *Binford,* 77 L. ed. (adv. op.) 203, 211. But as was held in *Buck* v. *Kuykendall,* 267 U. S. 307 and *Bush & Sons Co.* v. *Maloy,* 267 U. S. 317, the exercise of the same legislative power in the same manner and to the same end when applied to interstate carriers by motor vehicle is invalid. It is invalid because it is sought to be applied in a field

exclusively within the control of Congress and beyond the power of the states.

In the instant case, it is apparent that the authority which the Supreme Court of Ohio held to have been delegated to the appellee, and to have been properly exercised by the appellee in refusing the appellant a certificate upon the ground that U. S. Route 20 was already unduly congested, is the same police power to regulate the use of the highways as that upon which the lower courts in the *Buck* and *Bush* cases sought to sustain the action of the Washington and Maryland commissions.

This is strikingly shown by the quotation by the Supreme Court of Ohio in support of its decision in *Motor Truck & Transport Co.* v. *Public Utilities Comm.*, 125 O. S. 374, 181 N. E. 665, 666-667, R. 35, of the following language from the opinion in the *Buck* case (267 U. S. 307, 315):

> "With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject."

However sound as a general proposition the foregoing may be, reference to the opinion will show that Mr. Justice Brandeis was not laying it down even as a *dictum*. The passage is a paraphrase of the contentions made by the appellee in that case (Brief of Appellee pp. 31-49) which had been adopted in the opinion of the lower court (295 Fed. 197) and had been

approved by the earlier decision of the Supreme Court of Washington (*Northern Pacific Ry. Co.* v. *Schoenfeldt,* 123 Wash. 579, 213 Pac. 26). That it is only such a paraphrase is shown by the fact that the excerpt quoted is introduced by the following words (267 U. S. at 314):

> "In support of the decree dismissing the bill this argument is made: . . ."

And the court specifically rejected this argument pressed upon it as a justification of the interference with interstate commerce resulting from the order of the Washington commission in that case, for the opinion goes on to say (267 U. S. at 315):

> "The argument is not sound."

Two conclusions may therefore be drawn, first, the *Buck* and *Bush* decisions determine that even though regulation sought to be imposed upon an interstate common carrier finds its source in the legislative power to regulate the use of the highways in order that they may be conserved and the safety of the traveling public protected, this will not suffice to sustain the refusal of a certificate or permit to an interstate carrier; and second, the instant case cannot be distinguished from the *Buck* and *Bush* decisions on the ground that the legislative power sought to be exercised here differs from that relied upon in those cases. In each case the orders complained of were sought to be justified by the power to regulate the use of the highways.

The object of the statute and the legislative power exercised in its enactment and enforcement are the same in this case as in the *Buck* and *Bush* cases. Furthermore, the precise method of the exercise of

power is the same—exclusion of an interstate common carrier by denial of a certificate. There is now to be considered the effect of the refusal by the Ohio commission upon interstate commerce.

ii. The effect upon interstate motor transportation of the regulation in the present case is the same as in the Buck and Bush cases.

It is not contended that a state may not in any instance exercise its police power for the promotion of safety upon the highways where such exercise applies to and affects interstate commerce. Numerous decisions of this Court have upheld state statutes which reasonably and indirectly affected interstate motor transportation.

Hendrick v. *Maryland,* 235 U. S. 610.
Kane v. *New Jersey,* 242 U. S. 160.
Morris v. *Duby,* 274 U. S. 135.
Sprout v. *South Bend,* 277 U. S. 163.
Sproles v. *Binford,* 286 U. S. 374.
See *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 365-66.

The regulations involved in the cases just cited were not designed and did not operate to exclude vehicles traveling in interstate commerce; their objects were to *permit* such operation upon compliance with specific and reasonable requirements. Any vehicle so complying could operate. The fact that those who refused to comply were barred was only an indirect and incidental burden on interstate commerce. These regulations fall within the classification of Mr. Justice Brandeis already quoted from *Buck* v. *Kuykendall,* 267 U. S. 307, 315:

> "It may be assumed . . . that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable."

This assumption, viewed in the light of the record and the decision in the *Buck* case, is significant. It brings out in bold relief the proposition that each attempted exercise of state legislative power "to promote safety upon the highways and conserve their use" must be scrutinized separately and the directness of the burden thereby imposed upon interstate commerce determined by its actual effect upon the free flow of such commerce.

It is submitted that the effect of the refusal of the Ohio commission to grant the appellant the certificate which he sought has the same effect upon interstate commerce as the refusals by the Washington and Maryland commissions in *Buck* v. *Kuykendall,* 267 U. S. 307 and *Bush & Sons Co.* v. *Maloy,* 267 U. S. 317.

In each instance, the commission's order purported to exclude the applicant from operation in interstate commerce over the route set forth by him in his application. In each, the refusal was absolute, not conditional, and of continued and not merely temporary duration. If it is said that the applicant can again apply and that if conditions have changed the application may be allowed, that was equally true in the earlier cases.

Here, as there, the commission, by its denial, not only has controlled but has prevented the proposed operation of the applicant in another state. Cf. *Hall* v. *DeCuir,* 95 U. S. 485.

Moreover, in the present instance, as in the *Buck* and *Bush* cases, only common carriers are sought to be excluded from operation over the proposed route. This follows from the fact that the provisions of the Ohio statute (Ohio General Code, Section 614-84) apply only to common carriers. Private or contract carriers and "shipper-owned" trucks are not thereby subjected to regulation, and may operate freely in interstate or intrastate commerce without first procuring a certificate or permit. *Hissem* v. *Guran,* 112 O. S. 59, 146 N. E. 808; *Motor Freight Inc.* v. *Public Utilities Comm.,* 120 O. S. 1, 165 N. E. 355.

Furthermore, in this case as in the *Buck* and *Bush* cases, common carriers who already have been granted interstate certificates are permitted to continue to operate. Whatever the reason given by the commission for its refusal of a certificate, the effect upon competitive conditions consequent upon the action of the Ohio commission is precisely the same as that resulting from the similar denials by the Washington and Maryland commissions. Certificated common carriers are vested with a virtual monopoly; they alone may engage in common carriage in interstate commerce over U. S. Route 20. The language of District Judge Hough in *Cannonball Transp. Co.* v. *American Stages,* 53 F. (2d) 1051, is peculiarly applicable (p. 1053):

> "State laws, regulatory in nature, which by the terms thereof deny to common carriers for hire engaged in interstate business the use of the highways, in effect amount to a prohibition of competition, violate the Commerce Clause of the Constitution of the United States, and such legislative enactments, which in their practical application permit infringing upon or burdening interstate commerce, are unconstitutional. Buck

> v. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. ed. 623, 38 A. L. R. 286; Bush, etc. v. Maloy et al., 267 U. S. 317, 45 S. Ct. 326, 327, 69 L. Ed. 627; Red Ball Transit Company v. Marshall et al (D. C.) 8 F. (2d) 635. Likewise, the order of an administrative board or officer, the obedience of which will infringe upon or burden interstate commerce, is unconstitutional. Magnuson v. Kelly (D. C.) 35 F. (2d) 867."

It is urged that the words of this Court in the *Buck* case apply with equal vigor and precision to the refusal by the commission in the instant case (267 U. S. at 315-16):

> "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner."

In short it is a direct regulation of the business of those engaged in interstate commerce.

The analogy to the *Buck* case extends to the fact that U. S. Route 20, the highway over which the appellant seeks to operate in purely interstate commerce, is primarily an interstate highway, constructed with federal aid under the provisions of the Federal Highway Act (*U. S. C. A., Title* 23, *Sections* 1-25). While this act does not supercede the power of the states to enact regulations which constitute indirect burdens on interstate commerce and effect only the manner of the use of the highways by those engaged in such commerce (*Morris* v. *Duby*, 274 U. S. 135), it does graphically demonstrate the importance of the uninterrupted flow

of interstate motor vehicle transportation. Mr. Justice Brandeis' reference in *Buck* v. *Kuykendall*, 267 U. S. 307, 316, to "the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways", is clarified by him in the *Bush* case (267 U. S. 317, 324) where he states:

> "The federal aid legislation is of significance not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be open to interstate commerce."

If it is within the power of a state legislature or of a state commission to refuse a purely interstate common carrier a certificate and thereby absolutely to exclude such carrier, or, if it deems fit, all such carriers, from operating in interstate commerce over a federal aid highway, this purpose of Congress obviously wholly fails of accomplishment.

iii. The affirmance of the judgment of the lower court in this case would be inconsistent with the decisions in the Buck and Bush cases.

A further point deserves careful consideration. *Buck* v. *Kuykendall*, 267 U. S. 307 and *Bush & Sons Co.* v. *Maloy*, 267 U. S. 317, hold that the power to admit or exclude an interstate common carrier from the highways of a state on considerations of adequacy of the existing transportation facilities is vested exclusively in Congress. If Congress were to vest in the Interstate Commerce Commission,[1] or some other body, the

[1] Seven bills providing for federal regulation of interstate motor transportation for hire were introduced at the first session of the present (72nd) Congress H.R. 5596, 7239, 7246, 12229, 12541, 12739; S. 2793. Extended hearings were held upon S. 2793 by the Senate Committee on Interstate Commerce.

authority to regulate interstate motor transportation by means of certificates of convenience and necessity, and if the appellant were to procure such a certificate to operate over U. S. Route 20 from Cleveland to the Ohio-Michigan line and thence to Detroit, the federal commission having found that the existing facilities were inadequate, it would obviously be beyond the concurrent power of the state through its commission to prohibit the appellant from operating over the route provided for in his federal certificate, although it believed such route to be unduly congested. That Congress has not as yet seen fit to exercise the power which is determined in the *Buck* and *Bush* decisions to be vested exclusively in it, does not alter the fundamental inconsistency between those decisions and the determination in the present case that the action of the commission is within the concurrent power of the state. The power of Congress, on the one hand, to admit or exclude an interstate carrier for the reason that the existing transportation facilities warrant admission or exclusion, and the alleged power of a state, on the other hand, absolutely to exclude such carriers because of highway congestion, are incompatible.

B. THE ORDER OF THE COMMISSION IS INVALID BECAUSE IT IMPOSES AN UNREASONABLE, AS WELL AS A DIRECT, BURDEN UPON INTERSTATE COMMERCE.

It is clear that though the burden upon interstate commerce, imposed by a particular state regulation is only indirect, it may yet be invalid because unreasonable. "The reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce. . . ." *Hendrick* v. *Maryland,* 235 U. S. 610, 623; cf. *Railroad Co.* v. *Husen,* 95 U. S. 465.

In the present case, it is submitted not only that the action of the commission constitutes a direct burden on interstate commerce, but that such action is unreasonable in that it is not calculated to eliminate or prevent traffic congestion on U. S. Route 20 in any reasonably perceptible degree.

The commission has not taken the position that all common carriers must cease operation over U. S. Route 20; those which already hold certificates may continue to operate regardless of traffic conditions. (R. 37) That there are at least nineteen such transportation companies engaged in carrying freight, not to mention interstate and intrastate bus operation, is shown by the record. (R. 6)

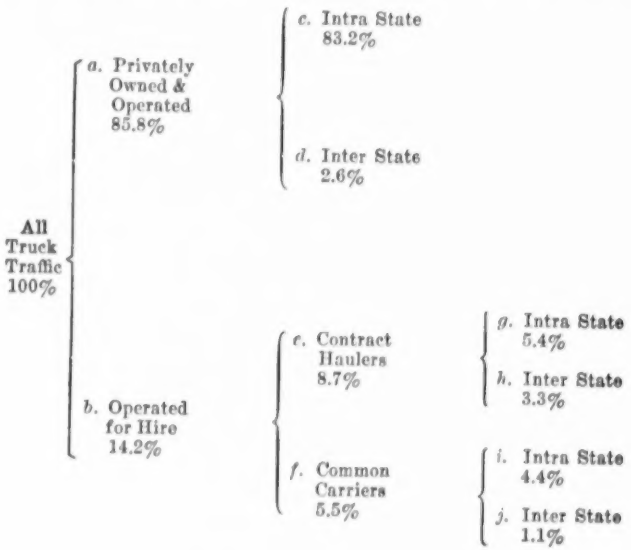
Furthermore, as has been pointed out above, the authority of the Ohio commission extends only to common carriers; contract carriers and "shipper-owned" trucks may operate freely and without restriction in either interstate or intrastate commerce. *Ohio General Code, Section* 614-84; *Hissem* v. *Guran,* 112 O. S. 59, 146 N. E. 808; *Motor Freight, Inc.* v. *Public Utilities Commission,* 120 O. S. 1, 165 N. E. 355.

The number of such trucks far exceeds those engaged in common carriage.[1] No limitation is placed or may be placed by the commission upon increase in the number of such trucks which may operate regardless of existing or future congestion. The cargoes which the appellant desires to transport may, and in all likelihood, will be hauled over the route which he desires to travel in equipment similar to that belonging to him, and causing as much congestion upon U. S. Route 20 as would the appellant were he permitted to operate.

It may be argued that to some extent the freight which appellant and other future applicants might

[1] The following most recent statistics relative to the distribution of trucks according to use are reported in an article, "The Problem of Motor Vehicle Regulation with Special Attention to the Movement of Highway Traffic Across State Lines," by H. H. Kelly, Division of Highway Transport, Bureau of Public Roads, U. S. Department of Agriculture, published in the December issue of "Public Roads":

CHARACTERISTIC DISTRIBUTION OF TRUCK TRAFFIC


All Truck Traffic 100%
a. Privately Owned & Operated 85.8%
b. Operated for Hire 14.2%
c. Intra State 83.2%
d. Inter State 2.6%
e. Contract Haulers 8.7%
f. Common Carriers 5.5%
g. Intra State 5.4%
h. Inter State 3.3%
i. Intra State 4.4%
j. Inter State 1.1%

carry will be diverted to the railroads or to already certificated common carriers by truck who have unused carrying capacity in trucks now operating and thus the increase in the number of trucks will be in some measure restricted. This, however, is not sufficient to justify the action of the commission. *It was upon this very ground and for this very reason that the state courts in the Buck and Bush cases upheld the similar refusal of the commission in those cases. This Court in reversing those decisions held this precise argument to be unsound. See supra,* pp. 12-18.

The action of the commission, it is submitted, was unreasonable in one final respect. The only evidence supporting the finding of the commission that any congestion existed consisted of two traffic counts, one by an employee of the Pennsylvania Railroad Company at Fremont, Ohio, on July 8, 9, and 10, 1931, (R. 13-16); and the other, taken by employees of the appellant, also in the City of Fremont, a short distance from the spot of the first count on February 3, 4 and 5, 1932. (R. 16-20) The latter count showed, in the opinion of the person supervising the count, no traffic congestion whatever. (R. 18) Upon this meagre evidence, the commission found "that said State (*sic*) Route 20, at this time, is so badly congested by established motor vehicle operation, that the addition of the applicant's proposed service would create and maintain an excessive and undue hazard." (R. 21) In short, the commission found on the basis of traffic counts taken at substantially the same place in the single city of Fremont, through which Route 20 extends for only 2.2 miles (R. 5), *that the whole of U. S. Route 20* from Cleveland to the intersection of Route 20 and Route 102, a distance of approximately 100 miles (see map, opposite page 5

of Record) was so congested as to demand that no further common carriage operation be permitted over that route. That this is the proper interpretation of the commission's finding and order is borne out by the unconditional form of the denial order. The order does not grant the certificate on the condition that the route be amended to avoid the "congested" area at Fremont; it is an absolute refusal because "Route 20 . . . is so badly congested . . . ." It is submitted that the finding of fact upon which this order of the commission was based is unsupported by the evidence and that the order is therefore an unreasonable burden upon and interference with interstate commerce. *St. Louis-San Francisco Ry. Co.* v. *Public Serv. Comm.*, 261 U. S. 369; *Railroad Co.* v. *Husen*, 95 U. S. 465.

C. THE ORDER OF THE COMMISSION CANNOT BE JUSTIFIED, UPON THE RECORD IN THIS CASE, ON THE GROUND THAT THERE IS A REASONABLE, UNCONGESTED, ALTERNATE ROUTE OVER WHICH THE APPELLANT MAY OPERATE.

The court below in its opinion in *Motor Transport & Truck Co.* v. *Public Utilities Comm.*, 125 O. S. 374, 181 N. E. 665, 667, R. 36-37, asserts that:—

> "The Public Utilities Commission does not preclude operation by the plaintiff in error over our state highways, but directs operation over a route which will result in diverting the proposed increased traffic from a highway now found to be overburdened. The record does not disclose that the order of the commission will result in the prohibition of the business of one engaged in interstate commerce, nor even that it will cause substantial interference therewith. The action of the commission is not shown to have been arbitrary or unreasonable, nor does it appear from the record

> that the carrier may not as well operate between the desired termini over another highway which is not so congested as to have become unduly hazardous. . . . The record discloses that other applicants for interstate operation over said route, having been refused, have been granted such certificates covering an amended route. It is apparent that the same ruling is now intended to govern subsequent applicants, whether the proposed operation is interstate or intrastate."

In that opinion particular reliance was placed upon *Phillips* v. *Moulton,* 54 F. (2d) 119 (D. C., R. I.). It is submitted that, even assuming the decision in the latter case is sound, it does not extend to govern the present case.

In *Phillips* v. *Moulton,* the complainants were interstate carriers of persons operating between Providence, R. I. and Boston, Mass. The Rhode Island commission made an order in which the complainants were "required to present to this Commission on or before October 15, 1931, for approval, such amendments to their respective routes and termini, as will eliminate the use of Eddy and Worcester Streets (in Providence) and any terminus thereon, and to cease operation through said streets on and after November 1, 1931." (54 F. (2d) at 120.) This order seemingly was predicated upon a finding that such streets were unduly congested. (54 F. (2d) at 121.) The complainants sought to enjoin its enforcement on the ground that it constituted an interference with interstate commerce. The three-judge Federal District Court denied the injunction, but refused to dismiss the bill. District Judge Letts said (54 F. (2d) 121):

> "Such regulations, though they may entail some degree of inconvenience or interference, will not be

regarded as a direct and unlawful burden upon interstate commerce. The reasonableness of such regulations, as applied to motor vehicles, must be judged with a proper regard to the safety and convenience of the public, in view of local conditions on the one hand, and the necessities of those engaged in interstate transportation upon the other."

The reason for the court's refusal to dismiss the bill is most important and fully appears from the following quotation (54 F. (2d) at 122):

"In the present case there is apparent in the order of the public utilities commission no discrimination as between carriers, nor intent upon its part to impose unfair or unreasonable conditions. On the contrary, the attitude which has been manifested by the commission has been one of cooperation and reasonableness. It is observed, however, that while the order which the commission has entered specifically directs the cessation by the complainants of operation upon the routes now utilized, the procedure outlined in the order provides no assurance for the acceptance or approval of new routes and termini prior to the date fixed for such discontinuance. The reasonableness of the regulation proposed under the order here in question can only be appraised by the reasonableness of the substituted routes and termini to which the commission will give its approval. Assuming that the complainants will themselves cooperate by submitting reasonable proposals for substituted routes, the commission may not bar them from the use of their present routes and termini without giving its approval to others that are reasonable and adequate.

The prayer for injunction is now denied, but, to the end of affording proper protection to complainants' rights, the bill of complaint is not dismissed,

> and this court will, at any time within one year from the date hereof, consider the application of any of the parties complainant to reopen if sufficient showing be made that reasonable substituted routes and termini are not approved."

Thus the theory of *Phillips* v. *Moulton* is that the commission under proper statutory authority may exclude interstate carriers from one route, which it finds to be congested, if there is a reasonable alternate route which is uncongested. The existence of such a reasonable alternative vests the commission with power to deny the application, thus rendering valid a denial order which otherwise would constitute a direct burden upon interstate commerce, and would be beyond the power of the state to authorize or of the commission to promulgate.

Phillips v. *Moulton* also specifically determines that the commission may not interrupt the operation of an interstate carrier over a route found to be congested by the commission, unless and until the commission has approved and granted a certificate permitting operation over a reasonable and adequate alternate route. The court in that case does *not* uphold the power of the commission to interrupt or obstruct interstate commerce but only in fact to reroute it. And therein lies the essential distinction between *Phillips* v. *Moulton,* and the decision of the Supreme Court of Ohio in the present case. In this case, the order of the commission to deny the appellant a certificate and thus to prevent and exclude him from engaging in interstate commerce, was sustained without modification. In thus sustaining the action of the commission, the court below departed from the precedent of *Phillips* v. *Moulton* and the basic theory upon which that case proceeds. The decision

below in this case upholds an unconditional exclusionary order whereas the court in the *Phillips* case in fact condemned such an order unless and until its exclusionary features were eradicated by the approval of a reasonable substitute route. In a word, the *Phillips* case recognizes that an order which results only to prevent interstate motor transportation is invalid under the decisions of this Court in *Buck* v. *Kuykendall,* 267 U. S. 307, and *Bush & Sons Co.* v. *Maloy,* 267 U. S. 317. The court below, on the other hand, fails to recognize this.

The attempt of the Ohio court to justify its decision in *Motor Truck & Transport Co.* v. *Public Utilities Comm.,* 125 O. S. 374, 181 N. E. 665, on the facts disclosed in the record in *that* case relative to the granting of certificates over amended routes to applicants refused certificates over Route 2, seems unsound. As has been shown, the exclusionary order is, in effect, a direct burden upon interstate commerce. To place upon the applicant the onus of continuing to apply until he happens upon some route which meets the approval of the commission, or of proving that no reasonable, uncongested, alternate route exists, adds a still further burden to the already direct one upon interstate commerce resulting from the denial order. Furthermore, that additional burden is unnecessary. The Ohio Commission, under the authority vested in it by Ohio General Code, Section 614-88, to attach terms and conditions to the grant of a certificate, could easily have granted a certificate, prescribing a reasonable alternate route over which appellant might operate, if such a route in fact existed.

Whatever the record in the *Motor Transport & Truck Co.* case might have disclosed, however, there is nothing in the present record to indicate the willingness of the

commission in this or any other case to grant an amended route to *any* applicant for a certificate to operate over U. S. Route 20. The order of the Commission denying appellant's application contains a flat and unqualified refusal. It contains no suggestion relative to an alternate route; much less does it grant the certificate for operation over such a route. The gist of the order is the exclusion of the operation of the appellant over U. S. Route 20, regardless of the resultant obstruction to interstate commerce. It is not in any sense an attempt reasonably to adjust and distribute interstate traffic "with a proper regard to the safety and convenience of the public, in view of local conditions on the one hand, and the necessities of those engaged in interstate transportation upon the other." *Phillips* v. *Moulton,* 54 F. (2d) 119, 121. In short, it denies but it does not reroute.

Finally, there is nothing in this record to show that any reasonable alternate route exists. Upon the foregoing analysis of *Phillips* v. *Moulton,* this fact, it is submitted, is conclusive of the invalidity of the order of the commission.

The denial order, under the *Buck* and *Bush* cases, is *prima facie* in excess of the power of the commission and therefore invalid. The existence of an alternate route is matter in confession and avoidance, rendering valid an otherwise unlawful interference with interstate commerce. It should consequently be set up by the commission in its order by granting or tendering a certificate for operation over such alternate route. Additional authority for this proposition is found in *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183 where, dealing with taxes upon interstate motor carriers, Mr. Justice Brandeis, said (p. 186):

> "As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for the use of the highways or to defray the expense of regulating motor traffic."

The present case, the appellant believes, is the first which this court has been called upon to decide in which it is urged upon the court that a state has the power, in the absence of congressional action, to reroute, within reasonable limits, the interstate motor traffic over the highways within its borders.[1] However sound may be the proposition that a state is possessed of such power, it is submitted that the present record does not present a case for its application for the reason that the order of the commission here involved is not an attempt to reroute, but is an absolute and unconditional denial of the appellant's proposed interstate operation.

II. THE ORDER OF THE COMMISSION IS INVALID BECAUSE IT IS IN CONTRAVENTION OF THE APPELLANT'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The situation resulting from the commission's position that no further interstate certificates are to be granted over U. S. Route 20 has been outlined above. (See supra, pp. 20-21.) Common carriers operating intrastate as well as interstate who already hold certificates are permitted to continue operation. All contract carriers by truck or bus and all "shipper-owners", old or new, may use that highway at will. Vehicles in

[1] In *Hammond* v. *Schappi Bus Line*, 275 U. S. 164 and *Hammond* v. *Farina Bus Line*, 275 U. S. 173, somewhat similar arguments were raised but not determined. See also *Farnum* v. *Public Utilities Comm.* 158 Atl. 713 (R. I.), certiorari denied October 10, 1932, 77 L. ed. (adv. op.) 19.

number and size far in excess of those which the appellant desires to use may at any time commence operation over the route forbidden to the appellant.

The basic classification for the exclusion depends not on the size, weight or equipment of the vehicles proposed to be used, nor upon any other factor containing potentialities for increasing traffic congestion. The only distinction between those who are permitted to use the highway and those who are not lies in the nature of the business in which they are engaged. Common carriers not already holding certificates are put in one class and are prohibited, while *all others,* whether or not they transport property for hire or for commercial purposes, are admitted.

The principles of constitutional classification are lucidly explained by Mr. Justice Brandeis, dissenting in *Quaker City Cab Co.* v. *Penna.,* 277 U.S. 389, 406:

> "In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

Thus it is required (1) that the classification must rest upon some real difference; and (2) that the difference must bear a substantial relation to the object of the legislation or administrative action.

The difference between motor vehicles engaged in

common carriage and those that are not may for some purposes be an important one. The business of the former is affected with a public interest and subject to regulation while that of contract carriers probably is not. (*Frost* v. *Railroad Comm.*, 271 U.S. 583; *Smith* v. *Cahoon*, 283 U.S. 553; *Stephenson* v. *Binford*, 77 L. ed. (adv. op.) 203. Certainly the business of the shipper-owner is not. Cf. *Continental Baking Co.* v. *Woodring*, 286 U.S. 352.

This distinction, however, bears no conceivable relation to the object of the commission's action, the prevention and relief of traffic congestion upon U.S. Route 20. Congestion is caused by the tangible presence of too many vehicles in too small a space. It is in no way attributable to or increased by the intangible fact that the owner of any particular vehicle engages in holding himself out to the public to carry the goods of all who proffer them. A five ton truck used in common carriage obviously causes no more congestion than a five ton truck used for the carriage of the goods of its owner, or of the goods of another under contract.

In *Smith* v. *Cahoon*, 283 U.S. 553, it was held that the exemption of contract carriers of farm products from the provisions of a statute requiring liability insurance of contract carriers constituted a discrimination violative of the Equal Protection Clause. The reasoning of Mr. Chief Justice Hughes in that case is particularly applicable here (283 U.S. at 566-567):

> "But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the State's action. In the present instance, the regulation as to the giving of a bond

> or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the state to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' "

There seems less justification for the classification in the present case, which depends upon the character of the business engaged in by the particular carrier, than for a classification, such as that found in *Smith* v. *Cahoon,* based upon the character and origin of the freight carried.

The action of the commission not only results in a discrimination in favor of contract carriers and owner operated vehicles; it also unduly favors existing certificated common carriers operating over U.S. Route 20. As has been said, existing certificated carriers are

given, by virtue of the commission's action, a practical monopoly.

Such a discrimination between common carriers operating in interstate commerce was held unconstitutional in *Magnuson* v. *Kelly,* 35 F. (2d) 867. That was a suit in equity brought by a common carrier of passengers to enjoin interference with its interstate business. The plaintiff had applied to the Kentucky commission for an interstate certificate to operate seven-passenger touring cars, four trips each way each day, from Dayton, Ohio, through Cincinnati, Ohio, to Lexington, Kentucky. The application was denied, but the plaintiff was granted a certificate to operate two trips each day over the designated route. The reasons given by the commission for the denial of a certificate for the other two trips were that the designated route was congested and that the allowance of a certificate for the additional two trips would be detrimental to the public safety and would "unnecessarily increase the wear and tear" upon the highways. (35 F. (2d) 867, 868.) A three-judge Federal District Court granted a preliminary injunction on the ground that the refusal of the Kentucky Commission created an unlawful discrimination against the plaintiff and in favor of the other certificated interstate carriers of passengers operating over the route which the plaintiff desired to traverse. The court said, (35 F. (2d) at 869):

> "In the case of Morris v. Duby, 274 U.S. 135, 47 S. Ct. 548, 81 L. ed. 966, it was held that a state may limit the weight of trucks engaged in interstate commerce. But it was recognized that such and like limitations can be exercised only by uniform regulations.
>
> * * * * *
>
> "The discrimination had in view is between intrastate and interstate commerce. A state cannot

discriminate in favor of intrastate commerce against interstate commerce. No more can a state discriminate between interstate common carriers for hire by motor vehicles. This is what we have here."

CONCLUSION.

For the foregoing reasons, that the order of the Public Utilities Commission of Ohio was in contravention of the Commerce Clause and the Fourteenth Amendment of the United States Constitution, and therefore invalid, is

Respectfully submitted,

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January, 1933.

APPENDIX A

The relevant portions of the Ohio General Code are as follows:

Sec. 614-84. (a) The term "motor transportation company," when used in this chapter, shall include, and all provisions of law regulating the business of motor transportation, the context thereof notwithstanding, shall apply to, every corporation, company, association, joint stock association, person, firm or co-partnership, their lessees, trustees, receivers or trustees appointed by any court whatsoever, when engaged in the business of transporting persons or property, or both, or of providing or furnishing such transportation service, for hire, for the public in general, in or by motor propelled vehicles of any kind whatsoever, including trailers, over any public highway in this state; provided, however, that the term "motor transportation company" as used in this chapter shall not include any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, in so far as they own, control, operate or manage a motor vehicle or motor vehicles used for the transportation of persons or property, or both, and which are operated exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous thereto, or in so far as they own, control, operate or manage taxicabs, hotel busses, school busses or sightseeing busses, or in so far as they own, control, operate or manage motor propelled vehicles, the use of which is for the private business of the owners and the use of which for hire is casual and disassociated from such private business.

Sec. 614-86. The public utilities commission of the state of Ohio is hereby vested with power and authority to supervise and regulate each such motor trans-

portation company in this state; to fix, alter and regulate rates; to regulate the service and safety of operation of each such motor transportation company; to prescribe safety regulations, and designate stops for service and safety on established routes; to require the filing of annual and other reports and of other data by such motor transportation companies; to provide uniform accounting systems; and to supervise and regulate motor transportation companies in all other matters affecting the relationship between such companies and the public to the exclusion of all local authorities in this state, except as hereinafter otherwise provided.

. . . . . .

Sec. 614-87. No motor transportation company shall commence its operation as such in this state, without first obtaining from the public utilities commission a certificate declaring that public convenience and necessity require such operation.

The commission shall have the power, after notice and hearing, when the applicant requests a certificate to serve in a territory already served by a motor transportation company holding a certificate of public convenience and necessity from the commission, to grant a certificate only when the existing motor transportation company or companies serving such territory do not provide the service required or the particular kind of equipment necessary to furnish such service to the satisfaction of the commission, and in all other cases, with or without hearing, to issue such certificates as prayed for, or to refuse to issue the same, or to issue them for the partial exercise only of the privileges sought, or to issue such certificates for the use of certain kinds of equipment and for the handling of certain kinds of material or merchandise over such routes, and may attach to the exercise of the rights granted by such certificates, such terms and conditions as, in its judgment, the public convenience and necessity may require. . . .

Sec. 614-100. Every motor transportation company and every officer, agent or employee thereof, and every

other corporation, company, association, joint stock association, person, firm or co-partnership who violates or fails to comply with or who procures, aids or abets the violation of any provision of sections 614-84 to 614-102, inclusive, of the General Code, or who fails to obey, observe or comply with any order, decision, rule or regulation, or any part or provisions thereof, of the public utilities commission, or who procures, aids or abets any motor transportation company in its failure to obey, observe or comply with such order, decision, rule or regulation, or any part or provision thereof, shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than twenty-five dollars and not exceeding one thousand dollars.

Sec. 614-101. Neither sections 614-84 to 614-102, inclusive, of the General Code, nor any provisions thereof, shall apply or be construed to apply to commerce with foreign nations or countries, or among the several states of this Union, except in so far as the same may be permitted under the provisions of the constitution of the United States and the acts of congress.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 395.

C. A. BRADLEY, DOING BUSINESS AS WOLVERINE MOTOR FREIGHT LINES,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

Appellant.

BRIEF IN BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO.

OPENING STATEMENT.

The appellant is an individual doing business as Wolverine Motor Freight Lines. His business is the transportation of freight by means of motor vehicles. In so

far as the business proposed to be done in Ohio is concerned, it would be interstate in its nature.

The appellant filed an application with the Public Utilities Commission of Ohio, for a certificate of convenience and necessity, to operate from Cleveland, Ohio, to the Ohio-Michigan state line north of Toledo, with Flint, Michigan, as the point of final destination, the major portion of such proposed route being over State Route 20 (R., 5). Protests were filed to the application and at the hearing before the Public Utilities Commission of Ohio testimony as to the degree of congestion of traffic over Route 20 between the points mentioned in appellant's application was offered by the appellant and also by the protestants.

Upon the issues joined, and upon the consideration of the testimony, the Public Utilities Commission of Ohio found that at the time of the hearing, State Route 20 was so badly congested by established motor vehicle operations that the addition of the applicant's proposed service would create and maintain an excessive hazard to the safety and security of the traveling public and to the property upon such highway, and denied such application. After the application for rehearing had been overruled by the Public Utilities Commission of Ohio, appellant prosecuted error to the Supreme Court of Ohio, which Court, upon final hearing, affirmed the order of the Public Utilities Commission of Ohio.

SUMMARY OF ARGUMENT.

The contentions of the appellee, in direct opposition to those of appellant, are as follows:

(1) That the order of the Commission, denying appellant's application for a certificate to operate over State Route 20 in interstate commerce, is not such a direct and unreasonable burden upon interstate commerce as to constitute an encroachment upon the power over such commerce vested in Congress by the commerce clause of the Federal Constitution.

(2) That the order of the Commission does not violate the equal protection clause of the Fourteenth Amendment of the Federal Constitution, even though the Commission has power to exclude only common carriers, having as yet no jurisdiction over contract carriers and shipper-owners.

(3) The question as to whether the order of the Commission is justified on the record in this case is not before this Court.

ARGUMENT.

I.

THE ORDER OF THE COMMISSION IS VALID BECAUSE IT IMPOSES NO DIRECT OR UNREASONABLE BURDEN UPON INTERSTATE COMMERCE.

It should be borne in mind that, at least in so far as the state of Ohio is concerned, the appellant is not now, and never has been, engaged in interstate commerce. His application, as well as his petition, negates the fact that he is so engaged.

His application before the Public Utilities Commission was for a certificate of convenience and necessity "to establish, maintain and operate a motor transportation company carrying property as a common carrier." His application was specifically to establish and operate such route over State Route 20 (R., 21, 22).

The contention of the appellant unintentionally indicates that the Public Utilities Commission of Ohio denied generally to the appellant the right to engage in interstate transportation in Ohio. The only application that was before the Commission was to engage in such transportation over a particular highway. The order of the Commission does not purport to deny to the appellant the right to operate, or to make application for a certificate, over any other highway within the state of Ohio.

As observed by Matthias, judge, in **Motor Transport & Truck Company v. Public Utilities Commission of Ohio**, 125 O. S., 374, 379, which holding is incorporated in the decision of the Supreme Court of Ohio in the instant case by reference (see **Bradley, d. b. a. Wolverine Motor Freight Lines v. Public Utilities Commission of Ohio**, 125 O. S., 381):

> "**The Public Utilities Commission does not preclude operation by the plaintiff in error over our state highways, but directs operation over a route which will result in diverting the proposed increased traffic from a highway now found to be overburdened. The record does not disclose that the order of the Commission will result in the prohibition of the business of one engaged in interstate commerce, nor even that it will cause substantial interference therewith. The action of the Commission is not shown to have been arbitrary or unreasonable, nor does it appear from the record that the carrier may not as well operate between the desired termini over another highway which is not so congested as to have become unduly hazardous.**
>
> We cannot concur in the theory of counsel for the plaintiff in error that such action is discriminatory against interstate commerce unless the restriction be made applicable to other motor transportation companies, no matter when certified or how long in operation, and they also be rerouted over another line of travel. **The record discloses that other applicants for interstate operation over said route, having been refused, have been granted such certificates covering an amended route. It is apparent that the same ruling is now intended to govern subsequent applicants, whether the proposed operation is interstate or intrastate.**" (Boldface ours.)

A. The Instant Case Differs From the Cases of Buck v. Kuykendall and Bush & Sons Co. v. Maloy.

In the case of **Buck v. Kuykendall**, 267 U. S., 307, the certificate of convenience and necessity was refused by the state Commission for the reason that, in the opinion of the Commission, the territory sought to be covered by the proposed line was adequately served by other lines. Mr. Justice Brandeis, at page 315 of that opinion, in holding the order of the Commission in that case void, said, with reference to such order, that:

> "Its primary purpose is not regulation with a view to safety or the conservation of highways, but the prohibition of competition."

This Court did not purport in that case to hold the statute void as interfering with interstate commerce, but merely held the order of that Commission void because of its purpose. In the case at bar there is no question of competing motor transportation lines or an attempt to prohibit such competition. The finding of the Commission here was that the safety and conservation of the highways required the order as made.

It is likewise held in the case of **Bush & Sons Co. v. Maloy**, 267 U. S., 317, that:

> "A state cannot forbid the use of its highways by motor vehicles operated by common carriers for hire over regular routes in interstate commerce, **merely because existing lines of transportation would be prejudiced thereby.**" (Boldface ours.)

The appellee has always recognized the principle stated in the cases of **Buck v. Kuykendall** and **Bush & Sons Co. v. Maloy**, that a state may not refuse an interstate motor carrier a certificate of convenience and necessity to operate over a route or highway of the state on the ground that such operation would furnish detrimental competition to existing transportation lines operating over such highways, but it is respectfully submitted that those cases will not bear the interpretation placed upon them in the brief of the appellant.

B. The Appellee May Require Appellant to Obtain a Certificate of Convenience and Necessity Before Commencing Operations.

In the case of **Clark v. Poor**, 274 U. S., 554, this Court had before it the statutes in question in the case at bar, viz., Sections 614-84 to 614-102a, General Code of Ohio, and held, as stated in the first paragraph of the headnotes of that case as reported in 71 L. Ed., 1199:

> "A carrier contemplating the use of the highway of a state exclusively in interstate commerce may be required to secure a certificate from the state officials. * * *"

See also,

> **Continental Baking Company v. Woodring**, 286 U. S., 352.

Therefore, the question has been determined by this Court that an interstate motor transportation company may be required to obtain the certificate of convenience and necessity and to pay the tax or fee prescribed by the

Ohio statutes, and that such requirement does not violate the commerce clause of the Federal Constitution. The principle is equally well settled that proof of convenience and necessity for such proposed interstate operation is not required.

C. The Appellee Is Not Required to Issue Such Certificate Without Regard or Consideration of the Questions of Public Safety and Conservation of Property in the Highway.

The contention of the appellant is, in substance, that the state of Ohio cannot refuse to issue such certificate of convenience and necessity even though the condition of the particular highway over which such operation is sought may be so congested that the proposed service would create and maintain an excessive and undue hazard to the safety and security of the traveling public, and the property upon such highway.

That a state is not so limited would seem to be apparent from the language of Mr. Chief Justice Taft in Morris v. Duby, 274 U. S., 135, 143, as follows:

> "An examination of the acts of Congress discloses no provision express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the state may rightfully prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike

to vehicles moving in interstate commerce and those of its citizens."

This language is quoted with approval by Mr. Chief Justice Hughes in **Sproles v. Binford**, 286 U. S., 374, 389, who stated further at pages 388, 389, of that opinion:

> "In exercising its authority over its highways the state is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the state may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure. Ohio Oil Co. v. Conway, 281 U. S., 146, 159, 74 L. Ed., 775, 781, 50 S. Ct., 310. When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the Courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."

Thus the general rule is definitely established that, at least until Congress, in the exercise of its discretion, sees fit to enact laws for the regulation of interstate motor transportation companies in the use of the highways, the state may impose upon motor vehicles using said highways in interstate commerce reasonable regulations for the purpose of insuring the public safety and of protecting its property in and upon such highways.

This Court has specifically held that the state has the right to exclude unnecessary vehicles, when operated for hire, from its highways, and that such regulation promotes safety and is not a violation of the commerce clause of the Federal Constitution. **Morris v. Duby**, 274 U. S., 135, 144.

This Court has further specifically held that a requirement of a state law which limits the weight of motor vehicles and load which may lawfully pass over its highways, even though applicable to interstate carriers as well as intrastate carriers, does not violate the commerce clause of the Federal Constitution. **Sproles v. Binford**, 286 U. S., 352; **Moris v. Duby**, 274 U. S., 135.

This Court has further specifically held that the state may levy a tax upon motor transportation companies using the highways for their purposes in intrastate and interstate commerce and use such funds for the maintenance of such highways. **Clark v. Poor**, 274 U. S., 554; **Michigan Public Utilities Commission v. Duke**, 266 U. S., 570; **Sprout v. City of South Bend**, 274 U. S., 163; **Interstate Busses Corporation v. Blodgett**, 266 U. S., 245; **Interstate Transit Company, Inc. v. Lindsey**, 283 U. S., 183.

Mr. Chief Justice Butler, in delivering the opinion of the Court in the case of **Interstate Busses Corporation v. Holyoke Street Railway Company**, 273 U. S., 45, 52, said:

> "Undoubtedly, the state has power in the public interest reasonably to control and regulate the use

of its highways so long as it does not directly burden or interfere with interstate commerce."

Packard v. Banton, 264 U. S., 140, 144;
Cain v. New Jersey, 242 U. S., 160;
Hendrick v. Maryland, 235 U. S., 610.

D. The Order of the Commission Is Merely a Regulation of the Use of the Highway.

The order of the Commission in the instant case does not purport to be a regulation of transportation, but purports rather to be a regulation of the use of a particular highway, in the exercise of its police power for the purpose of protecting the public safety and property rights upon the highway. As stated by the Court in **Sproles v. Binford**, 286 U. S., 374, at page 388:

> "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the Courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."

The appellee is the administrative arm of the Legislature in this case.

If the contention of the appellant be sustained, its practical effect would be to compel the state of Ohio to issue its certificate of convenience and necessity to any transportation company desiring to operate in interstate transportation by motor vehicle over any improved highway suitable to the applicant and regardless of the congestion of traffic thereon, and should such paving subsequently become unsatisfactory to the applicant he could

then make application for a certificate to operate over any other highway that was, in his opinion, suitably improved. The Public Utilities Commission would then be without authority to refuse such certificate. In other words, if the contention of the appellant is correct, the states are at the mercy of any person who desires to enter into the business of interstate motor transportation until such time as Congress may, in the exercise of its discretion, adopt laws regulating such transportation. However, this Court, in the case of **Sproles v. Binford**, 286 U. S., 374, speaking through Mr. Chief Justice Hughes, at page 394 stated:

> "It cannot be said that the state is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, **but we perceive no constitutional ground for denying to the state the right to foster a fair distribution of traffic**, to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain." (Boldface ours.)

II.

THE ORDER OF THE COMMISSION IS VALID BECAUSE IT IS NOT IN CONTRAVENTION OF THE APPELLANT'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The appellant contends that the order of the Commission violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution for the reason that the Public Utilities Commission of Ohio has no jurisdiction to deny to contract carriers and "shipper-owners" the right to operate over State Route 20, and further that its order classifies common carrier motor transportation companies as between those which are now operating and those which seek to operate. The premise upon which this argument is based is wrong.

In so far as the Ohio law regulating motor transportation companies, as defined in Section 614-84 of the General Code of Ohio, is concerned, the appellant himself sought to be classified as such upon making his application for a certificate. In so far as private carriers are concerned, the state of Ohio has not as yet seen fit to exercise the same police power which was so recently upheld by this Court in the case of Stephenson v. Binford, 77 L. Ed. (adv. op.), 203. Therefore, there is no classification in the Ohio law such as is discussed in the brief of the appellant.

In the case of the Continental Baking Company v. Woodring, 286 U. S., 352, this Court had before it an interpretation of the Kansas statute which established regulations and imposed a tax on public carriers without at the same time imposing similar regulations on like vehicles which were not public vehicles as defined in such act. This Court held in such case that a statute which made a distinction between its requirements as to public carriers and private carriers did not violate the Fourteenth Amendment of the Federal Constitution. Mr. Chief Justice Hughes, in delivering the opinion of the Court at page 368, says:

> "The distinction made by the statute between public and private carriers with respect to the obtaining of certificates of public convenience and necessity, and as to rates and charges, indicates the intention to keep separate the special responsibilities of public carriers from the more limited but still important duties which are owing as well by private carriers, in protecting the public highways from misuse and in insuring safe traffic conditions, and there is no reason to conclude that the authority given to the Commission will not be viewed and exercised accordingly."

The rule laid down by this Court as to the classification by law of subjects for regulation, is that any classification which is reasonable and not arbitrary does not violate the Fourteenth Amendment of the Federal Constitution. See Smith v. Cahoon, 283 U. S., 533; Quaker City Cab Co. v. Pennsylvania, 277 U. S., 289.

It is difficult to determine from the brief of the appellant whether the Ohio statute or the order of the Com-

mission is the subject of attack. In Smith v. Cahoon, supra, it was the statute which was held unconstitutional. The language from the opinion in Quaker City Cab Co. v. Pennsylvania, supra, quoted at page 34 of the brief of the appellant is particularly apt to the issue here. In that case it was held that the classification must rest upon a difference which is real as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike. The appellant here has never been situated in a like position with existing interstate carriers operating between Cleveland, Ohio, and points in Michigan, and it is apparent from the decision of the Ohio Supreme Court in Motor Transport and Truck Co. v. Public Utilities Commission of Ohio, 125 O. S., 374, that future applicants will be treated in the same manner as the appellant so long as the Commission remains of the opinion that State Route 20 is overly congested. Further, this Court held in the case of Quaker City Cab Co. v. Pennsylvania, supra, as follows:

> "That the object of the classification must be the accomplishment of a purpose or the promotion of a policy which is within the permissible functions of the state."

Without admitting that the order of the Commission here constitutes a classification as argued by the appellant, but assuming for the purpose of argument that it effects a classification, the question then arises as to the purpose or policy of the Commission in rendering the order, and whether or not it was within the permissible function of the state.

This Court held, in the Minnesota Rate Cases, 230 U. S., 352, at page 402:

> "Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power."

In the case of Sage v. Baldwin, 62 Fed. (2d), 962, the Court recognized a definite distinction between the use of the public highways of a state in the ordinary manner and the use of the highways for the purpose of gain. In that case, the Court held that the state authorities may regulate, in the exercise of the police power of the state, in regard to (at page 971)

> "highway protection; competent drivers, who shall be licensed; the hours of drivers; the giving of bond to secure the public against loss from personal injuries; the inspection and approval or disapproval of the equipment; the display of the license tag; the equipment itself; **classification of the highways of the state as to congestion**; and their character and ability to withstand use—all as provided for as traffic safety provisions in the act."

See also,

> Buck v. Kuykendall, 267 U. S., 307, 315;
> Morris v. Duby, 274 U. S., 135, 144.

In the most recent pronouncement by this Court on the question of state power, viz., Stephenson v. Binford, 77 L. Ed. (adv. op.), 203, the Court stated:

> "Section 22 (b) is a broad declaration of policy. It declares that the business of operating as a motor carrier of property for hire along the highways of the state is one affected with the public interest. It further declares that the rapid increase of motor traffic and the lack of effective regulation have increased the dangers and hazards on public highways and made more stringent regulations imperative to the end that the highways may be rendered safer for public use, the wear and tear upon them reduced, discrimination in rates eliminated, **congestion of traffic minimized**, the use of the highways for transportation of property for hire restricted to the extent required by the necessities of the general public, and the various transportation agencies of the state adjusted and correlated 'so that public highways may serve the best interest of the general public.'"

In upholding the validity of the Texas statute, this Court reaffirmed the right of the states generally to regulate the use of the highways from the standpoint of safety and the preservation of property. Quoting further from the opinion in that case:

> "It is enough if it can be seen that in any degree, or under any reasonable conceivable circumstances there is an actual relation between the means and the end."

The purpose of the Commission in rendering its order is obviously similar to the purpose underlying the Texas statute. It is respectfully contended, therefore, by the appellee that it is clearly a permissible function of the state.

III.

THE QUESTION AS TO WHETHER THE ORDER OF THE COMMISSION IS JUSTIFIED ON THE RECORD IN THIS CASE IS NOT BEFORE THIS COURT.

Repeatedly this Court has stated the rule that in proceedings to review the action of state courts this Court will not enter into a consideration of questions of fact, that it will accept the determination of those courts in matters of fact as conclusive, and will inquire simply whether there have been errors of law. **Gardner v. Bonestell,** 180 U. S., 362, 370; **Western Union Telegraph Company v. Call Pub. Co.,** 181 U. S., 92, 103; **Gleason v. White,** 199 U. S., 54; **Israel v. Arthur,** 152 U. S., 355; **Keokuk & H. Bridge Company v. Ill.,** 175 U. S., 626; **Jenkins v. Neff,** 186 U. S., 230.

It is respectfully submitted, therefore, that the finding of the Commission, affirmed by the Supreme Court of Ohio, that State Route 20 was so badly congested by established motor vehicle operations that the addition of the applicant's proposed service would create and maintain an excessive hazard to the safety and security of the traveling public and to the property upon such highway, is not reviewable in this proceeding.

The appellant contends, on page 27 of his brief, that the order of the Commission cannot be justified upon the record on the ground that there is a reasonably uncon-

gested alternate route over which the appellant may operate. Such question is a question of fact. No application was before the Commission requesting authority to operate over any route other than Route 20, as hereinbefore pointed out. The arguments contained in the appellant's brief are directed at the finding of the Supreme Court of Ohio in the case of **Motor Transport & Truck Company v. Public Utilities Commission**, 125 O. S., 374, which was incorporated by reference in the opinion of such Supreme Court in the instant case.

In support of his contention in this regard, appellant relies mainly upon the case of **Phillips v. Moulton**, 54 F. (2nd), 119. An examination of that case will readily distinguish it from the case at bar. There the Rhode Island Commission ordered an existing interstate motor bus company to change its routes and terminals in the city of Providence, Rhode Island. The three judge Federal District Court sustained in toto the principle underlying the order of the Commission when it denied the injunctive relief sought, holding that the police power of the state had not been unreasonably exercised. In the instant case the appellant insisted in his application and hearing before the Commission, and here now insists, upon the unqualified right to operate over State Route 20. The Ohio Public Utilities Commission does not have the statutory right to substitute in a certificate issued by it a route other than that described in the application. It must either grant or deny the certificate on the basis of the particular route named. There are, of course, statutes in the Ohio Motor Transportation Law

which enable any applicant to amend his application while it is pending, but no section authorizes the arbitrary substitution of routes by the Commission itself. Furthermore, it is to be noted in the case of Phillips v. Moulton that the injunctive relief sought was directed also against the board of public safety of the City of Providence, the facts disclosing that the police were also interfering with the operation of the carrier's busses. These facts undoubtedly account for the decision of that Court in declining to dismiss the bill of complaint at the time the injunctive relief was denied. **The right of the state to foster a fair distribution of traffic is clearly upheld by that decision.**

At page 32 of the appellant's brief is the statement that there is nothing in the record to show that any reasonable alternate route exists. Attached to the application of the appellant as filed before the Public Utilities Commission of Ohio is a map of the state highways across the northern portion of the state of Ohio, a copy of which, with Route 20 in question outlined in red, is attached to the record at page 5. Upon such exhibit are shown various other highways over which motor vehicles may travel from Cleveland to Toledo. While Route 20 may be more convenient for the applicant to travel with his load between these two points, it is evident that it is not the only route. The record does not disclose that any application was made by the applicant for a certificate of convenience or necessity to operate over any route other than Route 20. The application, as filed, did not leave to the Public Utilities Commission of Ohio, the

option of designating another route which it might have found suitable for the transportation business of the appellant nor to grant a certificate of convenience and necessity thereover (R., 2 and 3). Furthermore, as it appears from the opinion in the case of Motor Transport and Truck Co. v. Public Utilities Commission, 125 O. S., 374, quoted earlier herein:

> "The record discloses that other applicants for interstate operation over said route, having been refused, have been granted such certificates covering an amended route. It is apparent that the same ruling is now intended to govern subsequent applicants, whether the proposed operation is interstate or intrastate."

CONCLUSION.

It is therefore submitted that the order of the Public Utilities Commission of Ohio, denying the appellant's application to operate over State Route 20 between the cities of Cleveland and Toledo, for the reason that such proposed service would create and maintain an excessive and undue hazard to the safety and security of the traveling public and the property upon such highway, does not constitute such a direct or unreasonable burden on the appellant's proposed interstate commerce business that it is prevented by the commerce clause of the Federal Constitution; that the order of such Commission, refusing such application for a certificate of convenience and necessity, is not a violation of the equal protection clause contained in the Fourteenth Amendment to the Federal Constitution; and that the question of fact as to whether

the order of the Commission is justified on the record in this case was determined by the Supreme Court of Ohio and is therefore not before this court for review.

Respectfully submitted,

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